New York University
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School of Law

40 Washington Square South
New York, NY 10012-1099
Telephone: (212) 998-6293
Facsimile: (212) 995-4030
E-mail: barry.friedman@nyu.edu

Barry Friedman
Jacob D. Fuchsberg Professor of Law

July 19, 2004

Dear Representative,

We are writing to urge you to vote against the Marriage Protection Act, which would strip the federal courts of power to hear questions regarding certain provisions of the Defense of Marriage Act. This sort of jurisdiction-stripping has been employed but once in all of American history, and the circumstances were extraordinary. The history suggests the hesitation the Congress properly displays in eliminating the power of the lower federal courts to hear federal questions and that of the Supreme Court to ensure that such questions are resolved uniformly. Particularly given that stripping jurisdiction hardly guarantees the outcome its proponents prefer, passing this bill would make little sense. It also would be ironic, to say the least, to deprive the present Supreme Court of power to review DOMA on states' rights grounds, given the Court's recent history of solicitude to states' interests.

Only once in 217 years has the Congress arguably done what the MPA purports to do, and it did so when the fate of the Union seemed to require such an extraordinary step. In 1868, fearing that the Supreme Court might invalidate military Reconstruction of the South before the 14th Amendment could be ratified, Congress stripped the Court of jurisdiction to hear a habeas corpus appeal in a case, *Ex Parte McCardle*, that raised the question. To this day scholars debate whether the Court acceded to Congress' wishes because it feared congressional reprisal or because it believed the action legitimate. However, the *McCardle* Court pointed out in a footnote that its jurisdiction was not stripped entirely: there remained another avenue to obtain habeas corpus, but the petitioner had not used it.

Current controversies concerning marriage do not pose a threat akin to the danger of bloodshed and disunion that the Reconstruction Congress faced. Moreover, it is far from clear that the MPA would accomplish its purposes. The stated goal of the legislation is to protect state prerogatives to decide the meaning of marriage. But state courts necessarily will interpret the terms of DOMA, and it is notably state – not federal – courts that have recognized a right to gay marriage (or to civil unions). State courts may well rule in ways members of Congress who support the MPA dislike, including striking down portions of DOMA as unconstitutional.

Such considerations understandably have prompted the question whether the MPA is a serious attempt to address the issue or simply a gesture for the benefit of constituents unhappy with recent gay rights decisions. Whatever the motivation, there is insufficient basis to depart from a long-standing congressional custom against using jurisdiction-stripping to control the federal courts. And if the bill is a gesture, history again is instructive, revealing that statements such as this have a way of coming around to bite the interests that made them. For jurisdiction-stripping is a game that can be played to achieve very different ends, not all of them congenial to proponents of this bill. In any event, attacks on the judiciary ultimately tend to be unpopular with constituents.

There is no small irony in attacking "activist" judges by stripping the jurisdiction of the federal courts, and particularly the Supreme Court, in the name of states rights. Surely it could not have escaped the notice of anyone on Capitol Hill that the present Supreme Court has acted on numerous occasions to strike down congressional legislation in order to protect state prerogatives. To strip the Court's jurisdiction out of a concern that it might invalidate DOMA brings to mind what opponents of the Reconstruction era jurisdiction-stripping measure had to say. They asked why Reconstruction Republicans would not permit the Court to decide the case "[w]ith five judges out of eight of their own appointment." Many members of Congress, and many in the country, saw it as "an admission that your legislation will not stand the test of judicial examination."

Prudence militates against passing this measure. It likely would lead to conflicting state court rulings on DOMA's meaning and constitutionality, with no judicial body competent to reconcile them. The present Supreme Court has proved itself trustworthy when state prerogatives are involved. More generally, the federal courts should be permitted to do the job for which they were established.

Sincerely,

Barry Friedman
Jacob D. Fuchsberg Professor of Law
New York University School of Law

Stephen B. Burbank
David Berger Professor for the Administration of Justice
University of Pennsylvania Law School